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Supreme Court of United States

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

STATE OF OREGON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation decided to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, publication of the *Cato Supreme Court Review*. The instant case raises squarely the question of the limits of the federal government's power under the doctrine of enumerated powers and is thus of central interest to the Cato Institute and its Center for Constitutional Studies

SUMMARY OF ARGUMENT

This case requires the Court to determine the limits of federal power and the extent of state sovereignty in the area of professional medical judgment – an area of professional regulation to which "States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy and O'Connor, JJ., concurring). Here, an unelected regulatory agent of the executive branch of the federal government has attempted to void, through *administrative*

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[1] In conformity with Supreme Court Rule 37, amicus has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amicus* also states that counsel for a party did not author this brief in whole or in part; and no person or entities other than the *amicus*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

action, not one but two ballot referenda duly conducted by the citizens of a sovereign state who sought to secure for themselves the right to obtain medical advice and assistance at the end of life. The two referenda at issue, enshrined in Oregon's "Death With Dignity Act," are part of an intense, morally charged debate as to which there is no national consensus, as is evidenced by the Court's several opinions in *Washington v. Glucksberg*, 521 U.S. 702 (1997). Oregon's law may be unorthodox, and even unique, but it has twice been endorsed by substantial majorities of Oregon voters.

Because the administrative decision at issue (known as the "Ashcroft Directive") purports to interpret a federal statute (the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA")) and related regulations that are premised on Congress' power under the Commerce Clause, the Court is called upon in this case to articulate the principle that distinguishes local from truly national concerns that are legitimately subject to regulation by the federal government. The Court's recent decisions define the precedential terminal points of the spectrum, with *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), providing examples of local issues not properly subject to federal regulation, and *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), providing an example of an issue the Court considers to be properly within the federal commerce power.

But as the multiplicity of opinions in *Raich* makes clear, defining where Congress' Commerce power ends and a state's role as primary expositor of social policy begins is a controversial inquiry, the relevant considerations for which this Court should identify with greater clarity. This concern is especially pressing here, since the expansive understanding of the commerce power on which the Ashcroft Directive is implicitly premised places in historic peril the very "notion of enumerated powers – a structural principle that is as much a part of the Constitution as the Tenth Amendment's explicit textual command" that powers not delegated to the federal

government are reserved to the states. *Raich*, 125 S. Ct. at 2226 (O'Connor and Thomas, JJ., and Rehnquist, C.J., dissenting).

That peril, while real, is nonetheless easy to avoid in this case. While *amicus* does not believe that the Court's current analysis of the commerce power accords with the Constitution's text, structure, or original meaning, to the extent that this Court is committed to following existing precedents, those precedents do make ***this*** case an easy call.

First, the Court's cases reflect a constitutional preference for democratically pedigreed judgments about the scope of what is national and what is local. Arguably, the Court's preference for democratically pedigreed balancing of national and local interests won the day in *Raich*, which suggested that Congress is the preferred expositor of what is local and national when Congress decides to "comprehensively" regulate an item that travels in interstate commerce. Even assuming, *arguendo*, that such deference was constitutionally proper, there is no basis for extending similar deference to an administrative agency's interpretation of the scope of federal commerce power. Agencies lack the democratic pedigree of Congress, to say nothing of the state referenda at issue. When an agency acts to supplant or undermine the outcome of direct democracy at the state level, as here, its judgment must be categorically disfavored. *Cf. Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (refusing to accord deference to administrative decision that is contrary to unambiguous legislative text and imposing a heightened standard of review where a federal administrative interpretation would interfere with democratic decisions at the state level).

Second, the Court's recent constitutional jurisprudence reflects a possible preference for narrow over broad judicial decisions, perhaps because it is thought that narrow judicial decisions "can be democracy-forcing, not only in the sense

that [they] leave[] issues open for democratic deliberation, but also and more fundamentally in the sense that [they] promote[] reason-giving and ensure[] that certain important decisions are made by democratically accountable actors." Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 6, 7 (1996). Whatever the general merits of this principle, *amicus* believes it is fully defensible as a governing principle for decisionmaking by federal *administrators*, especially when an administrative judgment purports to trump, in whole or in part, the judgments of local decisionmakers with both a superior democratic pedigree and a historic claim to regulatory primacy.

And, finally, since the days of Justice Brandeis, at least, numerous members of the Court have recognized a constitutional preference for state over federal regulation, based on the propensity for "a single courageous State [to] serve as a laboratory . . . and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This latter concern is especially relevant where, as here, (1) a state provides an escape hatch for dissenters seeking relief from competing legal regimes, and (2) does so in a fashion that the federal regulators themselves recognize imposes *no costs* on the interstate system. Indeed, it is in precisely this circumstance that Brandeis's laboratory justification for federalism is most potent: the state's heterodox policy decisions provide, at little cost to anyone, a wealth of information about untried competing policies that have been suppressed and silenced elsewhere.

All of these considerations are fully consistent with the outcomes of *Lopez*, *Morrison*, and *Raich*, and conclusively counsel against the Ashcroft Directive. The decision of the court below invalidating the Attorney General's interpretation should be affirmed.

ARGUMENT

The Court's federalism decisions over the past decade – particularly *Lopez*, *Morrison*, and *Raich* – reflect the Court's difficulty crafting a bright-line rule that determines when a federal government of limited and enumerated powers may decide controversial questions of social policy under Congress' power to regulate interstate commerce. But the difficulty of identifying a bright-line rule by no means reduces the importance of articulating relevant constitutional considerations that take seriously the concepts, integral to our constitutional order, of dual sovereignty and limited government. The "federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" for this Court "to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy and O'Connor, JJ., concurring).

This Court's precedents underscore, at a minimum, that whatever deference is due to "comprehensive" *legislative* judgments about the scope of the commerce power under *Raich* –*administrative* judgments do not deserve similar deference. Viewed in light even of *Raich*'s counsel of deference to democratic fact-finding about the scope of the commerce power, the Ashcroft Directive exceeds any plausible construction of permissible federal legislative authority.

The Ashcroft Directive also fails Commerce Clause scrutiny for a separate reason: It is neither "necessary" nor "proper" to the exercise of any enumerated Article I federal power, as those standards were articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As such, the Court should hold the Directive without effect – and do so without reference to any degree of "deference" putatively owed either Congress or agency regulators under *Raich*.

I. AN ADMINISTRATIVE INTERPRETATION OF FEDERAL COMMERCE CLAUSE AUTHORITY OVER LOCAL CONDUCT IS NOT ENTITLED TO DEFERENCE UNDER THIS COURT'S FEDERALISM PRECEDENTS.

A. Localism Is An Important Component Of The American System Of Dual Sovereignty.

Tocqueville recognized during his travels in early America that "the love and the habits of republican government in the United States were engendered in the township and in the provincial assemblies . . . [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large." Alexis de Tocqueville, *Democracy in America* 181 (Henry Reeve trans., 1961).

Protecting local republican government from encroachment by the central government is, of course, a defining feature of the unique American constitutional framework. As the authors of *The Federalist* explained, the "powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite [and] extend to all the objects, which . . . concern the lives, liberties, and properties of the people. . . . " *The Federalist* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Indeed, one of the principal criticisms of the new Constitution was that "it would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes." *The Federalist* No. 17, at 118 (Alexander Hamilton).

To this concern, the proponents of the Constitution offered two basic rebuttals. First, because of state governments' closer geographic proximity to their citizens, "the people of

each State would be apt to feel a stronger bias towards their local governments than toward the government of the Union," with the result that the people generally will look to state government as "the immediate and visible guardian of life and property." *Id.* at 119-20. Second, because of the regulatory competition inherent in a system of dual sovereignty, "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist* No. 51, at 323 (James Madison).

The second point is especially salient here: competition between different local jurisdictions plays an important role in protecting the welfare of ordinary Americans, just as competition in the economy furthers overall general welfare. "[S]maller units of government have an incentive, beyond the mere political process, to adopt popular policies . . . Since most people are taxpayers this means that there is a powerful incentive for decentralized governments to make things better for most people." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1498-99 (1987); *cf.* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956). In short, a system that favors state over federal regulation brings to social policy the same benefits that competition brings to economic policy – by increasing options that better balance competing interests. *See* James G. Hodge, Jr., *The Role of Federalism and Public Health Law*, 12 J.L. & Health 309, 356 (1997) ("The reality of the federal political process is that federal legislation and regulation invariably represents a mediocre compromise to the accomplishment of specific goals . . . [w]hile . . . state governments are generally more responsive to the needs of their citizenry").

Pluralism among local sovereignties is also information-forcing. The very purpose of the states' role as laboratories of social experimentation is to foster unorthodox ideas – even ideas that may be anathema in other parts of the country – and

thereby inform the judgments of competing sovereignties, state and local. Unorthodoxy may bring information to light that reigning common wisdom has ignored. And it may expose error – and hence promote consensus – far more effectively than the imposition of an artificial consensus by national fiat.[2]

The significance of states' role as laboratories of social experimentation – and its obvious import here, where Oregon has launched a nationally unorthodox but locally popular experiment in end-of-life decisionmaking – is underscored by the number of times members of this Court have invoked the concept to defend the right of the states to experiment free from federal interference. *See, e.g., Raich*, 125 S. Ct. at 2234-35 (O'Connor, J., Rehnquist, C.J., and Thomas, J., dissenting); *Blakely v. Washington*, 542 U.S. 296 (2004) (Kennedy and Breyer, JJ., dissenting); *United States v. Oakland Cannabis*

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[2] Indeed, the information-forcing component of federalism and its role in promoting liberty go hand in hand, since the raw data that local pluralism produces is the product of free individual choices between competing legal regimes that might otherwise be suppressed. Put another way, "[f]ederalism provides an additional level of freedom to individuals, beyond that provided by specific guarantees of individual rights, by conferring the freedom to choose from among various diverse regulatory regimes the one that best suits the individual's preferences." Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard*, 51 Duke L.J. 75, 138-39 (2001); *see also* McConnell, *supra,* at 1506 ("Given the diversity of views about issues of morality, and the potential for [political] oppression, it is natural that lovers of liberty would be inclined toward decentralized decision making."); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 912 (1994) (noting that the "point of federalism . . . is to allow normative disagreement amongst the subordinate units so that different units can subscribe to different value systems"); *see also* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 400 ("The model of participatory government [views] political activity not as instrumental toward achieving a proportionate share in distribution of available resources, [but] rather as a good in itself, something essentially implicated in the very concept of human freedom.").

Buyers' Coop., 532 U.S. 483, 502 (2001) (Stevens, Souter, and Ginsburg, JJ., concurring in the judgment); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, Souter, Ginsburg, Breyer, JJ., dissenting); *United States v. Virginia*, 518 U.S. 515, 600 (1996) (Scalia, J., dissenting).

B. Agency Interpretations Of The Scope Of Federal Commerce Power Deserve No Deference.

Despite the importance of localism in our constitutional federal framework, *Raich* suggested that Congress deserves deference when interpreting the scope of its commerce power over local conduct within the province of a comprehensive federal regulatory scheme. The Court in *Raich* reasoned that (1) a representative body composed of different sectional interests is best suited to identify what is national and what is local within the framework of a comprehensive regulatory scheme and that (2) this deference is most appropriate where the legislative judgment identifying what is national and what is local is evident on the face of a legislative enactment. Whatever the merits of that argument, the rationale of *Raich* does not apply in this case, when the federal judgment about the scope of federal commerce power is made by an *administrative agency* and is made in the course of interpreting an ambiguous statutory enactment.

1. Agencies have an inferior democratic pedigree.

First, in various contexts, the Court's decisions evidence marked suspicion of administrative judgments that conflict with accountable legislative judgments of Congress. The Court's most important decision involving deference to legal interpretations of administrative agencies, for example, makes clear that where a federal agency interprets a statute in a manner contrary to the unambiguous text of the statute, the statutory text – because of its democratic provenance – prevails. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). More recently, the

Court held the administrative interpretations even of ambiguous federal statutory text are subject to special scrutiny when they impinge on state laws. In *Solid Waste Agency v. United States Army Corps of Engineers*, the Court invalidated a federal environmental regulation on the ground that it was not supported by a "clear indication that Congress intended that" regulation, noting that the need for a clear statement from Congress "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 173.

The logic of these and similar authorities is fully applicable to Commerce Clause analysis under *Raich* in this case. First, in *Raich,* the intent of Congress to impose a "comprehensive" ban on marijuana distribution was evident from the face of the comprehensive legislative enactment, a fact the Court held counseled deference. *Raich*, 125 S. Ct. at 2204 (discussing treatment of marijuana under the CSA); *id.* at 2208 n.32 (noting that Congress's detailed "findings regarding the effects of intrastate drug activity on interstate commerce" rendered claims that Congress had not specified its intent to reach the conduct at issue with sufficient clarity "unfounded"). Yet, here, as explained in detail by the court of appeals, the parties, and other *amici*, the Attorney General's (putative) authority to regulate end-of-life medical decisionmaking is hardly self-evident from the text and structure of the CSA. The CSA was designed to address drug "abuse" – a word the Act's text, implementing regulations, and legislative history pervasively conflate with the health effects of "addiction" or "dependence," an issue not implicated here. *Cf. Raich*, 125 S. Ct. at 2203-04 (observing that "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances," and that the term "abuse," as used in the CSA schedules, is related to risks of "severe psychological or physical dependence"). Nor does the Act or its implementing regulations explicitly define the

textual term invoked by the Directive – "legitimate medical purpose" (21 C.F.R. § 1306.04) – to justify excluding drugs used for assisted suicide from the universe of statutorily permissible medical uses. Finally, the Act is designed to empower the "principal health agency of the federal government," not the Attorney General, to make medical decisions under the Act – an enforcement choice that is animated, as the court of appeals rightly noted, by a concern about the impropriety "of having federal officials determine the appropriate method of the practice of medicine." *Oregon v. Ashcroft*, 368 F.3d 1118, 1128 (9th Cir. 2004) (quoting H.R. Rep. No. 91-1444 (1970)); *cf. also* 42 U.S.C. § 290bb-2a (*quoted in United States v. Moore*, 423 U.S. 122, 144 (1975)).

Indeed, for these reasons Attorney General Ashcroft's predecessor, Janet Reno, refused to use her CSA enforcement powers as a basis for regulating end-of-life medical decisionmaking. *Cf. Ashcroft*, 368 F.3d at 1123. Then-Attorney General Reno observed in 1998 that the CSA was not "intended to displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." *Id.* (citations omitted). With respect to Oregon's Death With Dignity Act, she opined that "the CSA does not authorize [the federal government] to prosecute, or to revoke DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law." *Id.*

Second, *Raich* presumes that the job of balancing what is national and what is local under a comprehensive legislative scheme is best left to the body with the superior democratic pedigree. *See, e.g.*, Sam Bagenstos, *Commerce Clause Doctrine and Practicalities*, http://www.scotusblog.com/movabletype/archives/2005/06/commerce_clause.html (June 6, 2005) (noting *Raich* may reflect a preference for assessment of the "practical facts on the ground" by Congress instead of courts); Ernest A. Young, *Deference to Whom?*,

http://www.scotusblog.com/movabletype/archives/2005/06/deference_to_wh.html (June 6, 2005) (noting that *Raich* reflects "arguments about comparative institutional competence between courts and legislatures"). Here, the Attorney General's interpretation is in conflict with a clear and far more democratically pedigreed judgment – that of the people of Oregon. To be sure, state democratic processes are not always entitled to deference – as where, for example, their judgment conflicts with the Constitution or validly enacted legislative enactments within the scope of Congress' Article I powers. But, in cases where, as here, states act within the province of their traditional police power, and in conflict with a federal administrative decree issued under an ambiguous federal enactment, the sovereign democratic judgment of the state deserves *at least* the same priority as the clear statement of federal legislative will considered determinative in *Raich*.

Given the lack of any indication that Congress intended to make the Attorney General America's foremost regulator of medical decisionmaking for the terminally ill, the Court should take care to underscore that the Attorney General is not entitled to any deference under the Commerce Clause when he acts to expand federal legislative jurisdiction in a fashion that supplants, or undermines, Oregon's clear sovereign judgments.

2. Where agency decisionmaking risks conflict with a state's democratically-expressed preferences about regulation within the scope of its historic police powers, agency decisionmaking must at a minimum accord with this Court's preference for decisional minimalism.

The Court's recent decisions have evidenced a preference for "judicial minimalism": *i.e.*, a concern for protecting the widest possible field for democratic decisionmaking against incursions from the judicial apparatus of the government. *Amicus* is skeptical of strong claims for judicial minimalism,

including its predicate assumption that majoritarian decisionmaking is generally rational and benign. Nonetheless, as suggested by some of this Court's recent precedents, the preference for decisional minimalism weighs especially heavily against deference to *agency* determinations about the scope of federal commerce power in this case.

Some commentators defend judicial minimalism as an approach that promotes greater public participation in democratic decisionmaking: "One of the major advantages of minimalism is that it grants a certain latitude to other branches of government by allowing the democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems[.]" Sunstein, *supra*, at 19. This "minimalist" approach arguably is reflected in such decisions as *United States v. Salerno*, 481 U.S. 739, 745 (1987), where the Court expressed greater reluctance to accept a facial challenge to a statute than a narrower as-applied challenge; *United States v. Virginia*, 518 U.S. 515, 533 n.7 (1996) (citation omitted), where the Court decided an issue of major national controversy – the admission of women to a historically single-sex military college – while emphasizing that it "address[ed] specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as 'unique' . . . ."; and *Colorado Republican Federal Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 623-24 (1996), where the Court noted a "prudential reason for this Court not to decide the broader question" presented by a facial challenge to an election law.

To the extent the Court considers decisional minimalism a compelling basis of decision for courts, minimalism should certainly be the constitutionally preferred mode of decision when administrative *agencies* either explicitly or, in this case, implicitly interpret the scope of their own regulatory power under the Commerce Clause. After all, agencies, like courts, act without a strong democratic pedigree; worse, they lack the

constitutional authority that courts possess to engage in judicial review of state judicial systems. Thus, agencies' authority is especially insubstantial when they interpret the scope of their own delegated commerce power in derogation of express policies enacted through state democratic processes. On this score, the Ashcroft Directive is particularly objectionable, since it (1) cuts the widest conceivable berth for agency action in a situation where the statute it purports to enforce (the CSA) supplies scant textual justification for such action and (2) purports to thwart multiple state democratic referenda within the field of traditional state competence.

Furthermore, and more fundamentally still, principles of decisional minimalism also should apply with equal force to this Court's decision in *Gonzales v. Raich*. If courts should decide cases narrowly, then *Raich* itself must be read narrowly rather than broadly, in order to preserve the widest possible field for sovereign decisionmaking within the scope of states' police powers. That, at a minimum, means that *Raich* should be construed against extension to cases raising dissimilar facts.

Raich, of course, involved a very different set of facts from this case. For example:

- In *Raich*, the Court was asked to distinguish what is national from what is local in light of congressional imposition of a comprehensive nationwide ban on a particular controlled substance, marijuana. *See, e.g.*, 21 C.F.R. § 1308.11(c)(11), (d)(18)-(21) (classifying substances including marijuana, heroin, and lysergic acid as Schedule I substances); 21 U.S.C. § 812(b)(1) (Schedule I substances have a high potential for "abuse," no "currently accepted medical use," and "lack of accepted safety for use"); *id.* at § 829 (authorizing prescription only for Schedule II, III, IV, and V drugs); *Raich*, 125 S. Ct. at 2211 ("The CSA designates marijuana as contraband for *any* purpose") (emphasis in original). Here, by contrast, there is no

such ban: the substances in question are classified under Schedule II and III of the Controlled Substances Act, 21 U.S.C. § 812(b)(2), (b)(3). Under Schedule II and III, a legal market for these substances is permitted as a matter of federal law, contingent on the medical context in which those substances are used. *See, e.g.*, 21 U.S.C. § 812(b)(2), (b)(3) (defining Schedule II and III substances as those that have a "currently accepted medical use in treatment"); *id.* § 829(a) (authorizing dispensation of Schedule II drugs with "the written prescription of a practitioner"); *id.* § 829(b) (authorizing dispensation of Schedule III drugs with "a written or oral prescription").

- In *Raich*, the Court confronted what it deemed a compelling practical problem: namely, that replacing a bright-line ban on marijuana with a conditional ban in which use of the drug is legal or illegal depending on the medical context of use (the necessary result of deferring to California law at the federal level, as respondents in *Raich* effectively urged) would complicate enforcement of Schedule I. *See, e.g.*, *Raich*, 125 S. Ct. at 2213 (the "notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition"); *id.* at 2220 (Scalia, J., concurring) (suggesting federal enforcement of a ban on interstate trafficking of marijuana would be rendered "precarious" by California's Compassionate Use Act, since "medical" marijuana is "never more than an instant from the interstate market"). Here, that enforcement concern is non-existent—since no bright-line ban is in place. Instead, under the CSA, *all* enforcement decisions with respect to Schedule II and III drugs turn on contextual medical circumstances of use. *See, e.g.*, 21 U.S.C. § 812(b)(2), (3) (defining Schedule II and III drugs as

drugs with "currently accepted" medical uses); *id.* at § 829(b) (authorizing dispensation of Schedule II drugs when prescribed by a physician). As a result, the enforcement concerns raised in *Raich* are plainly not applicable here. Oregon's law does not alter the fact that distinguishing illegal and legal uses as a matter of federal law remains fact-specific.

- In *Raich*, Congress was concerned that isolated lawful use of the comprehensively banned substance, marijuana, might affect the price of the substance that moves in the illicit interstate market. *Raich*, 125 S. Ct. at 2207 ("Congress had a rational basis for believing that, when viewed in the aggregate, leaving [marijuana] outside the regulatory scheme would have a substantial influence on price and market conditions"). That concern, again, reflected the nature of the federal controls at issue in that case – which imposed a comprehensive ban designed to make purchase of the substance, marijuana, prohibitively expensive. Here, however, there is no evidence that Congress is concerned with making Schedule II or III substances prohibitively expensive. To the contrary, the plain text of Schedule II and III underscores that Congress is concerned primarily that these substances are used in accordance with medical judgment. *See, e.g.*, 21 U.S.C. § 812(b)(1)-(3) (distinguishing Schedule II and III drugs from Schedule I drugs based on the existence of "currently accepted" medical uses for these drugs); *id.* § 829(a) (treating Schedule II and III drugs differently from Schedule I drugs by authorizing dispensation of the former when made pursuant to prescription).

- Finally, as discussed above, in *Raich* the Court considered what it deemed to be a clear statement by Congress in favor of a total ban on Schedule I

controlled substances. Here, by contrast, the Court is asked to consider an Article II officer's interpretation of his delegated authority under a patently unclear legislative enactment.

In short, the regulatory setting considered here is very different from that at issue in *Raich*. This case asks the Court to permit a federal administrative officer to void multiple statewide democratic referenda concerning an activity that implicates no clearly expressed legislative policy and that poses no risk of diversion, enforcement confusion, or price effects for a comprehensively banned substance. At bottom, the executive branch asks to impose its policy judgments about end-of-life decisions on Oregon, supplanting the clearly expressed judgments of that state's citizens. And it does so based on uncertain Article I legislative authorization. If there is ever a case where "judicial minimalism" in the interpretation of precedent is called for, it is here: On the facts of this case, the Court should explicitly hold that *Raich* is inapplicable and further hold that, at a minimum, additional legislative guidance is necessary before the federal commerce power possibly can be construed, whether explicitly or, as here, *sub silentio*, to authorize imposition of the federal policy favored by a single executive officer, the Attorney General, on Oregon's electorate.

3. Agency interpretations of the scope of their own regulatory jurisdiction are especially suspect where an agency interprets an ambiguous statute to support a novel expansion of federal rulemaking jurisdiction with enormous social consequences.

Finally, any deference due to administrative agencies' interpretations of the scope of their own Commerce Clause power is especially weak where, as here, the choice is morally contentious and committed, by tradition and constitutional text (U.S. Const. amend. X), to state police power. "[O]ne might claim that courts, when interpreting statutes, should assume in

close cases that a decision with 'enormous social consequences' . . . should be made by democratically elected Members of Congress rather than by unelected agency administrators." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, Stevens, Souter and Ginsburg, JJ., dissenting) (citations omitted). And, indeed, cases like *Kent v. Dulles*, 357 U.S. 116, 129 (1958), picture the Court's use of that very canon to "ensure that certain decisions are made by Congress rather than the executive branch" when "they involve constitutionally sensitive domains" and threaten "to make rules interfering with [the] exercise of basic human liberties." Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. Cal. L. Rev. 1281, 1374 (2002) (quoting *Brown & Williamson*, 529 U.S. at 190 (Breyer, Stevens, Souter and Ginsburg, JJ., dissenting)); *cf. also Kent*, 357 U.S. at 130 (narrowly construing grant of congressional authority invoked by the Secretary of State in promulgating a rule that prohibited the award of passports to Communist Party members because "[w]e would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations").

Such concerns are also apt here. This Court's cases concerning the role of physicians in advising terminally ill patients on end-of-life decisions make clear that, precisely because of the controversial and unsettled nature of the issue, politically accountable actors like individual ***state*** governments should be permitted to experiment through the democratic process. In *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), the Court granted certiorari to decide whether the Constitution permits a state to impose a heightened evidentiary standard for justifying withdrawal of artificial hydration and nutrition from a comatose patient. Various members of the Court described that question as presenting "difficult and sensitive" and even "agonizing"

issues, *id.* at 292 (O'Connor, J., concurring), 292 (Scalia, J., concurring), but ultimately concluded that the Constitution permitted a state to take that position – with the caveat that that holding would not "prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment." *Id.* at 292 (O'Connor, J., concurring).

In *Glucksberg*, the Court granted certiorari to decide whether a state has the power to prohibit actions that cause or assist suicide. While noting that the states – and particularly Oregon – were "currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," the Court nonetheless concluded that it was a legitimate expression of the state political will to prohibit assisted suicide. *Glucksberg*, 521 U.S. at 719. Members of this Court took pains to point out, however, that a prohibition on end-of-life medical advice, including assisted suicide, is not the only permissible judgment a state might reach. As Justice O'Connor observed, "[t]here is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly under pressure." *Id.* at 737 (O'Connor, Ginsburg, and Breyer, JJ., concurring) (citing, *inter alia*, *New State Ice*). And Justice Stevens emphasized the importance of permitting the "continuation of the vigorous debate about the 'morality, legality, and practicality of physician-assisted suicide' in a democratic society," *id.* at 738 (Stevens, J., concurring), particularly in view of the fact that there is a "specific [constitutional] interest in making decisions about how to confront an imminent death." *Id.* at 745.

In *Vacco v. Quill*, as in *Glucksberg*, the Court granted certiorari to decide whether a state has the power to prohibit or limit assisted suicide. Again, members of this Court endorsed the view that the propriety of physicians' involvement in end-

of-life decisions, including assisted suicide, was a matter best left to democratic debate at the state level. *See* 521 U.S. 793, 809 (1997) (O'Connor, Ginsburg, and Breyer, JJ., concurring) (citing *New State Ice*). And again, Justice Stevens emphasized that there is "room for further debate" about the constitutional limits on suicide-assistance prohibitions. *Id.* (Stevens, J., concurring).[3]

Cruzan, *Glucksberg*, and *Vacco*, then, each raised a highly controversial question: whether the Constitution permits states to place limits on the right of individuals to determine the time and manner of their own deaths, and their associated right to seek assistance in doing so. This question was considered sufficiently debatable to warrant review by writ of certiorari. Each time, members of this Court concluded that the state laws in question were permissible in part because of the states' role in the constitutional order as laboratories of social experimentation. Yet it surely cannot be that if a state's power to prohibit end-of-life medical assistance is a close constitutional question, justifiable largely on the ground that states have the freedom to experiment with social policy, other states such as Oregon may be legally *required* to make that same political choice by an unelected federal administrator. *Cf. Equality Found. v. City of Cincinnati*, Nos. 94-3855, 94-3973, 94-4280, 1998 U.S. App. LEXIS 1765, at *4-5 (6th Cir. Feb. 5, 1998) (Boggs, J., concurring in denial of reh'g en banc) (noting that "[i]f in *Romer* [*v. Evans*] the Supreme Court held that cities may choose to enact gay-right ordinances without nullification by state constitutional amendment, it did not hold that cities must choose to do so"); *cf. also Brown & Williamson*, 529 U.S. at 190 (Breyer, Stevens, Souter and

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[3] It is significant in the context of this case that three members of the Court have separately emphasized the "importance of showing respect for the sovereign States that comprise our Federal Union" when it comes to reviewing state laws authorizing certain seriously ill individuals to use otherwise illegal drugs. *Oakland Cannabis*, 532 U.S. at 502 (citing *New State Ice*) (Stevens, Souter, and Ginsburg, JJ., concurring in the judgment).

Ginsburg, JJ., dissenting).

II. THE ASHCROFT DIRECTIVE FAILS SCRUTINY UNDER THE NECESSARY AND PROPER CLAUSE.

As Justice Scalia noted in his *Raich* concurrence, "activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone." 125 S. Ct at 2215-16 (Scalia, J., concurring). Federal regulatory power over such activities comes from the Necessary and Proper Clause and the Commerce Clause taken together. *Id.; cf. also Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964). Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), articulated the test for determining when congressional action in effectuation of an enumerated power is permissible under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.*

The Ashcroft Directive fails these tests. It is neither a "necessary" nor a "proper" means for making effective the CSA's regulation of interstate commerce in controlled substances.

1. To act in effectuation of an enumerated power under the "necessity" prong of the Necessary and Proper Clause, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power. *Raich*, 125 S. Ct. at 2219 (Scalia, J., concurring) (citation omitted). *Cf. also id.* at 2231 (Thomas, J., dissenting); *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 44 (1870) (finding ban on intrastate sale of lighting oils not "appropriate and plainly adapted means for carrying into execution" Congress' taxing power). A means is "plainly adapted" if there is an "obvious,"

"simple," and "precise" connection between the means and the constitutional ends. *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring) (citation omitted). These requirements "are not merely hortatory." *Raich*, 125 S. Ct. at 2219 (Scalia, J., concurring). Rather, they prevent claims of "necessity" from being used as a "pretext . . . for the accomplishment of objects not entrusted to the government." *McCulloch*, 17 U.S. (4 Wheat.) at 323; *cf. also* Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 202 (1995) (discussing *McCulloch* and stating that "when Congress regulates according to the Necessary and Proper Clause, either because of the textual requirement of 'propriety' or because of the need to assure that this clause not become the demise of Congress's limited power, the Court should assure that the invocation of this clause not be for improper ends").

The Ashcroft Directive fails this "necessity" test. *Amicus* assumes *arguendo* that the goal by which the "necessity" of the Directive must be measured is defined by Schedule II and III, which articulate the permissible uses of the regulated substances at issue in this case and therefore the scope of federal regulatory purpose at issue. *See, e.g., Raich*, 125 S. Ct. at 2219 (Scalia, J., concurring) (assuming that the relevant level of analysis under the Necessary and Proper Clause is the purpose of the governing statutory scheme, in that case, Schedule I, which aimed to "extinguish the interstate market" in marijuana). Yet, as discussed in Part I, those classifications do not purport to effectuate a comprehensive ban on subject substances. Rather, the classifications are designed to further a different goal: to ensure that the controlled substances, for which an interstate market exists, are prescribed pursuant to medical judgment. *See, e.g.*, 21 U.S.C. § 812(b)(1)-(3) (distinguishing Schedule II and III drugs from Schedule I drugs based on the fact that there are "currently accepted" medical uses for the former); *id.* § 829(a) (authorizing dispensation of Schedule II and III drugs according to a

prescription). While the Ashcroft Directive presumes that a federal role in defining medically legitimate uses is "necessary" to effectuate this goal, there is no "obvious," "simple" rationale for federal involvement in this way. *Sabri*, 541 U.S. at 613 (Thomas, J., concurring).

At the outset, the federal government provides no evidence that Oregon's policy is incompatible with a chosen *form* of federal regulation. In *Raich*, as discussed in Part I, Congress chose to regulate a substance that traveled in interstate commerce by comprehensively *banning* all uses of that substance. The Court recognized that such a ban entailed outlawing local uses of marijuana in all circumstances. Otherwise, the integrity of a total bright-line ban on that substance would have been in jeopardy. For example, placing local uses of a comprehensively banned substance outside Congress' reach would, the Court assumed, create enforcement problems that a bright line ban is designed to obviate and, relatedly, would subvert the effort to drive the substance from the market, a policy effectuated by making the banned substance prohibitively expensive. *See generally* Part I.B.2, *supra*.

Here, however, the chosen form of federal regulation is very different: no total, bright-line ban on relevant controlled substances is in place; instead, the scheme itself anticipates that the Schedule II and III substances at issue here are legal in some contexts and illegal in others, depending on medical judgments about their use in given contexts. *See, e.g.*, 21 U.S.C. § 812(b)(2), (3); *id.* § 829(a). Thus, maintaining the integrity of the chosen form of regulation does not "obviously" (*Sabri*, 541 U.S. at 613 (Thomas, J., concurring)) require a uniform federal judgment about the permissibility of uses. For example, because variation in legality of the substance, depending on context, is ***inherent*** to the regulatory framework as enacted, it cannot be argued that allowing Oregon to make its own decision about the scope of permissible uses raises special enforcement problems that the

chosen form of regulation is designed to preclude. *See* Part I.B.2, *supra*. Nor can it be argued that federal judgment is necessary to maintain a prohibitively high price for a comprehensively banned substance – since Schedule II and III do not attempt to drive any covered substances from the marketplace. 21 U.S.C. § 829(a).

To be sure, some might argue that there is a need for executive branch intervention where states have abdicated their responsibility to clarify the medically permissible uses of Schedule II and III substances, thereby confusing enforcement of the Act. But that is not the case here. To the contrary, the will of Oregon is expressed with simple clarity – albeit in a fashion objectionable to the current executive branch's policy preferences. Nor is there an "obvious" need for uniform federal administrative standards in this case, given the recognized benefits that state pluralism brings to an area of medical regulation that is deeply (and morally) contentious. To the contrary, if any understanding of states' role is "obvious," given the Court's longstanding articulation of the structural underpinnings of federal power, it is that states are the preferred regulators of local medical standards – and, at a bare minimum, are presumptively favored as such in the absence of a clear legislative statement to the contrary. *Linder v. United States*, 268 U.S. 5, 18 (1925) ("Obviously, direct control of medical practice in the States is beyond the power of the Federal Government").

Finally, the Ashcroft Directive itself concedes that the Directive, by design, will have *no* cross-border effects whatsoever. *See* Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001) (stating the directive "makes no change in the current standards and practices of the DEA in any State other than Oregon"); *cf. also* 21 U.S.C. § 822(b); 21 C.F.R. § 1306.04. When federal regulators themselves recognize that the effects of federal intervention will be confined entirely to a single state, any suggestion that the Ashcroft Directive is necessary

to effectively regulate the ***inter***state distribution of Schedule II and III drugs is completely unavailing, even under the most generous interpretations of this Court's Commerce Clause precedents.[4]

In the end, the Ashcroft Directive is a paradigmatic example of the kind of federal initiative that the test for "necessity" announced by Chief Justice Marshall in *McCulloch v. Maryland* is designed to combat. *McCulloch*, 17 U.S. (4 Wheat.) at 323 (Necessary and Proper Clause may not be used as a "pretext . . . for the accomplishment of objects not entrusted to the government"). Here, the existence of a detailed federal regulatory scheme is used by the executive branch as a pretext for supplanting a state policy (in favor of choice in end-of-life decisionmaking) with a federal one (motivated by opposition to such choice) – despite the fact that the imposition of the preferred federal policy is wholly unrelated to any salient administrative concern entailed by management of the Controlled Substances Act. Whatever *Raich* may mean, it cannot be interpreted to mean that agency enforcement power over a comprehensive scheme of regulations can serve as a cover for *any* tendentious assertion of agency power to supplant state law, no matter how unrelated it is to the administration of the regulatory scheme enacted by Congress.

2. The means chosen by the federal government to

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[4] Further evidence suggesting that the Ashcroft Directive is not a "plainly" adapted means of implementing the CSA is the determination of Attorney General Ashcroft's predecessor, Janet Reno, that federal law does *not* authorize administrative actions like the Ashcroft Directive. *Oregon v. Ashcroft*, 368 F.3d 1118, 1123 (9th Cir. 2004) (recounting that Attorney General Reno explained in 1998 that the CSA was not "intended to displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice" and opined that "the CSA does not authorize [the federal government] to prosecute, or to revoke DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law").

effectuate a legitimate goal must not only be necessary to the achievement of that goal, but they must also be "proper," in the sense that they cannot be otherwise inconsistent with "the letter and spirit of the [C]onstitution." *Id.*; *cf also Raich*, 125 S. Ct. at 2231 (Thomas, J., dissenting).

a. As Justice Scalia noted in *Raich*, "[c]ases such as *Printz v. United States* . . . and *New York v. United States* . . . affirm that a law is not '***proper*** for carrying into Execution the Commerce Clause' . . . '[w]hen [it] violates [a constitutional] principle of state sovereignty.'" 125 S. Ct. at 2219 (Scalia, J., concurring) (quoting *Printz v. United States,* 521 U.S. 898, 923-24 (1997) and *New York v. United States,* 505 U.S. 144, 166 (1992)) (emphasis in text of opinion).

The Ashcroft Directive violates constitutional principles of state sovereignty in at least three ways. First and most obviously, it violates Oregon's sovereign interest in regulating professional medical conduct within its borders. *Cf., e.g., Linder,* 268 U.S. at 18 ("Obviously, direct control of medical practice in the States is beyond the power of the Federal Government"); *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power"). Second, the Ashcroft Directive purports to veto two state-wide democratic referenda – a fundamentally sovereign act of self-government[5] – by the fiat of a single, unelected federal bureaucrat acting outside the deliberative process of Article I decisionmaking. If approved here, that veto would not only shutter laboratories of state civic experimentation long protected by this Court, but would do so in a fashion wholly inconsistent with the explicit

[5] *Cf., e.g., Rodgers v. Fed. Trade Comm'n*, 492 F.2d 228, 230 (9th Cir. 1974) (noting that when "the people[] act[] directly through either the initiative or referendum, [they] are exercising the same power of sovereignty as that exercised by the legislature in passing laws").

constitutional restraints on federal decisionmaking (bicameralism and presentment) that discipline and check novel new federal incursions into states' sphere of sovereign legislative decisionmaking. *See, e.g., INS v. Chadha*, 462 U.S. 919, 946-51 (1983).

Third, the Ashcroft Directive trenches on constitutional principles of state sovereignty by "requiring" the Oregon State Registrar to "administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. *Printz* left no doubt that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* The Court emphasized that "[i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.*

The Ashcroft Directive runs afoul of these rules. The Directive includes a provision entitled "Enforcement in Oregon," which notes that under Oregon statutory law, "an attending physician who writes a prescription for medication to end the life of a qualified patient must document the medication prescribed." 66 Fed. Reg. at 56,608 (citing 3 Or. Rev. Stat. § 127.855). The Ashcroft Directive then further notes that Oregon's Health Division must require any health care provider upon dispensing medication pursuant to the Death with Dignity Act to file a copy of the dispensing record with the Health Division. *Id.* These records, the Ashcroft Directive continues, "should contain the information necessary to determine whether those holding DEA registrations who assist suicides in accordance with Oregon law are prescribing federally controlled substances for that purpose in violation of the CSA as construed by this Memorandum[.]" *Id.* The Ashcroft Directive then conscripts the Oregon State Registrar – in defiance, of course, of the will of the majority of

Oregonians who twice endorsed Oregon's Death With Dignity Act – to either furnish the prescription dispensing records directly to the DEA or make them available to the DEA for inspection so that "appropriate administrative action" may be taken against offending physicians. *Id.* The Ashcroft Directive, therefore, enrolls the Oregon State Registrar as a low-cost federal law enforcer – again, contrary to the clearly expressed wishes of a majority of Oregonians and contrary to *Printz*, which does not permit such enrollments even where they might appear otherwise reasonable or efficient. *Cf. Printz*, 521 U.S. at 935.[6]

The Ashcroft Directive plainly violates multiple constitutional principles of state sovereignty, and for that reason is not a "proper" act in effectuation of the CSA.

b. Of course, the Constitution does not simply protect state sovereignty – it protects another, more fundamental form of "sovereignty," the liberty of the individual. *See, e.g.*, U.S. Const. amend I-IX, amend. XIV. Indeed, the protection of state sovereignty is merely an instrumental means for securing individual liberty, as this Court has recognized: "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States." *New York*, 505 U.S. at 181. Instead, "the Constitution divides authority between federal and state governments for the protection of individuals. State

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[6] *See* 66 Fed. Reg. at 56,608 ("Thus, it should be possible to identify the cases in which federally controlled substances are used to assist suicide in Oregon in compliance with Oregon law by obtaining reports from the Oregon State Registrar without having to review patient medical records or otherwise investigate doctors. Accordingly, implementation of this directive in Oregon should not change the DEA's current practices with regard to enforcing the CSA so as materially to increase monitoring or investigation of physicians or other health care providers or to increase review of physicians' prescribing patterns of controlled substances used for pain relief.").

sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Id.* (citation omitted).

Under a constitutional framework in which individual liberty is of preeminent constitutional importance, the "propriety" prong of the Necessary and Proper Clause should be interpreted to require at least as much federal attention and respect for individual liberty interests – both recognized and colorable.

In this case, there are colorable liberty interests at stake – namely, those of individuals to make end-of-life medical decisions without coercion by state bureaucrats in a distant capital. Members of this Court have recognized that those interests are neither insignificant nor without persuasive arguments for constitutional protection. *See, e.g., Vacco*, 521 U.S. at 809 (Stevens, J., concurring) (there is "room for further debate" about the scope of constitutional protection for autonomy to make end-of-life decisions); *Glucksburg*, 521 U.S. at 745 (there is a "specific [constitutional] interest in making decisions about how to confront an imminent death") (Stevens, J., concurring).

If the Necessary and Proper Clause calls for heightened attention to the needs of state sovereignty, then it should compel similarly heightened attention to the possible liberty interests implicated by this case. At a minimum, that requires the Court to apply a strong presumption in favor of the most basic *procedural* protection for disputed individual liberty interests – the pluralism, and attendant possibilities of choice, that division of authority among multiple competing sovereignties makes possible. Where, as here, federal policy would effectively destroy the heterodox policy of the sole state offering protection for a liberty interest – one that members of this Court have acknowledged may have a colorable basis for constitutional protection in some circumstances – that policy

patently violates the "propriety" prong of the Necessary and Proper Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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